UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRAVIS BEARDEN, Plaintiff, v. CITY OF OCEAN SHORES, et al., Defendants.	CASE NO. C21-5035 BHS ORDER

This matter comes before the Court on Defendants City of Ocean Shores and Dean Dingler's motions for summary judgment, Dkts. 15, 28. Because Plaintiff Travis Bearden fails to establish a genuine issue of material fact on any of his claims and Defendants are entitled to judgment as a matter of law, the Court grants the motions.

I. BACKGROUND

Bearden was employed as a firefighter for the City of Ocean Shores while he was also a member of the United States Army Reserve. At the end of 2013, Bearden attended basic training as a reservist, followed by advanced individual training. Dkt. 16 at 4. The advanced individual training ended in March 2014 and, thereafter, Bearden returned to work at the City. *Id.*

During his leave, the City paid Bearden through his use of other paid leave, "Kelly days,"[1] and 21 days of accrued military leave pursuant to RCW 38.40.060. Dkt. 17 at 2, ¶ 3. Bearden exhausted this paid leave in January 2014. *Id.* He did not return to work until March 2014. *Id.* Because Bearden was on unpaid leave throughout February 2014, no contributions were made to his retirement plan for that month. *Id.*

Beginning October 2017, Bearden again went on military leave. He provided the City with an annual schedule of the dates that he was required to report for military duty between October 1, 2017, and September 30, 2018. Dkt. 19 at 3, ¶ 5; 65–66. Bearden submitted this schedule pursuant to a state statute, which provides that public employees are entitled to "twenty-one days" of paid military leave "during each year beginning October 1st and ending the following September 30th in order that the person may report for required military duty, training, or drills." RCW 38.40.060(1).

Bearden subsequently requested paid military leave for March 7, 2018, even though this date was not listed on the schedule. *See id.* at 3, ¶ 6; 65–66. In response to this request, the City's fire chief at the time, David Bathke, sent Bearden a memorandum requesting him to provide the City with "orders . . . that reflect this March 7, 2018 participation date." Dkt. 17 at 32. Bearden responded that he "did not have orders" and asked Bathke to cite to a "state or federal ruling" requiring orders to be produced. *Id.* at 34.

[1] Kelly days are accrued paid leave days "provided to firefighters under their union contract to account for their irregular work schedules." Dkt. 17, ¶ 8.

Bathke sent Bearden another memorandum, informing him that, under RCW 38.40.060, military leave applied to only *required* military duty, training, or drills. *Id.* at 36. Bathke also informed Bearden that he could submit "a letter or other documentation from [his] commanding officer to establish that [his] absence on March 7 was for 'required military duty, training, or drills.'" *Id.* Ultimately, Bearden did not provide the City with any documentation indicating that he was required to report for military duty, training, or drills on March 7, 2018. *Id.* at 3, ¶ 7. Accordingly, the City did not charge this day to Bearden's military leave and, instead, charged it to other accrued leave. *Id.*

In October 2019, Bearden submitted a military order to the City stating that he was required to report to military duty from October 16, 2019, through October 30, 2019. Dkt. 18, ¶ 3; *id.* at 4. Bearden subsequently submitted another order stating that he was required to report for military duty for an additional nine months—from November 5, 2019, through August 27, 2020. *Id.* at 2, ¶ 3; 6.

The City charged the initial period of Bearden's absence to his 21 days of paid military leave. Dkt. 17 at 3, ¶ 8. After Bearden exhausted his military leave, he utilized other accrued leave, which he exhausted in February 2020. *Id.*

On February 19, 2020, the City's human resources specialist e-mailed Bearden, stating: "We wanted to reach out and let you know that as of 02/13/2020, we have put you on 'Leave without pay status', as your Vacation and Kelly time have both been exhausted." Dkt. 18 at 10. That day, Bearden responded, "Perfect. Thank you very much for reaching out." *Id.* In July 2020, Bearden submitted another order to the City

indicating that he would continue on military duty after August 27, 2020, for an additional 273 days. Dkt. 18 at 2, ¶ 3; 8.

On October 27, 2020, Bearden e-mailed the City's new fire chief, Mike Thuirer, requesting payment for 21 days of military leave beginning October 1, 2020, pursuant to RCW 38.40.060. *Id.* at 12. The City's human resources specialist responded to Bearden, informing him that, under RCW 38.40.060(4)(a),[2] public employees are entitled paid military leave only for days that they are scheduled to work. *Id.* at 14–15. She explained that Bearden was not entitled to paid military leave because he was on a "Military Leave of Absence, effective November 5, 2019, and ha[d] no scheduled work days." *Id*. at 15. As a result, Bearden was not charged any paid military leave following September 30, 2020.

Bearden sued the City alleging six violations of, and a claim for liquidated damages under, the Unformed Services Employment and Reemployment Rights Acts ("USERRA"), 38 U.S.C. § 4301 *et seq*. Dkt. 1 at 5–7. He subsequently amended his complaint, adding the City's mayor, Crystal Dingler,[3] as a defendant and adding a claim that Defendants violated the Washington Law Against Discrimination ("WLAD"), RCW Ch. 49.60. Dkt. 23 at 2, 10.

[2] This statutory provision states: "The officer or employee shall be charged military leave only for days that he or she is scheduled to work for the state or the county, city, or other political subdivision." RCW 38.40.060(4)(a).

[3] Crystal Dingler subsequently died, and Defendants substituted Dean Dingler into this action as the personal representative of her estate. *See* Dkts. 33, 41, 43.

The primary basis for Bearden's USERRA claims appears to be the City's refusal to charge him paid military leave under RCW 38.40.060 both on March 7, 2018, and for 21 days between October 1, 2020, and September 30, 2021. Indeed, in counts 1, 2, 4, and 5, Bearden claims that Defendants violated various provisions of USERRA that prohibit employers from denying employees in the uniformed services certain rights and benefits to which they are legally entitled.[4] In count 3, Bearden claims that Defendants violated 38 U.S.C. § 4311(b)—a statute prohibiting employers from discriminating against or taking adverse employment actions against those who seek to enforce rights protected under USERRA—by taking adverse employment actions against him and by constructively discharging him.[5] *Id.* at 9. And in count 6, Bearden claims that the City violated 38 U.S.C. § 4318—a statute regarding employee pension benefit plans—by maintaining a

---

[4] In particular, in count 1, Bearden claims that Defendants violated 38 U.S.C. § 4302(b)—a statute stating that USERRA supersedes any state policy that reduces, limits, or eliminates any right or benefit provided by USERRA—by imposing requirements in contravention of USERRA. Dkt. 23 at 8.

In count 2, Bearden claims that Defendants violated 38 U.S.C. § 4311(a)—a statute that prohibits employers from denying members in the uniformed services employment benefits because of such membership—by both denying him pay and benefits and imposing certain prerequisites to benefits based on his membership in the uniformed services. *Id.* at 8–9.

In count 4, Bearden claims that Defendants violated 38 U.S.C. § 4316(a), (b)—which imposes requirements regarding both seniority- and non-seniority-based benefits—by denying him rights and benefits that are both determined by seniority and not determined by seniority. *Id.* at 9.

And in count 5, Bearden claims that Defendants violated 38 U.S.C. § 4316(d) and 20 C.F.R. § 1002.153(a)—both of which authorize employees in the military service to use accrued paid leave when their employment is interrupted by a period of service—by denying Bearden paid leave that he accrued under RCW 38.40.060. *Id.* at 9.

[5] Bearden also alleges, in count 2, that Defendants constructively discharged him in violation of 38 U.S.C. § 4311(a). *Id.* at 8.

retirement plan that imposes requirements on members of the uniformed services beyond those required or permitted by USERRA. *Id.*

Regarding WLAD, Bearden claims in count 7 that Defendants "violated [his] WLAD-guaranteed protection from military related employment discrimination." *Id.* at 10.

The first motion for summary judgment, Dkt. 15, is directed at Bearden's USERRA claims. Defendants contend that Bearden was not entitled to paid military leave for March 7, 2018, because he did not substantiate his request with documentation indicating that he was required to report for military duty on that day. *Id.* at 10. Defendants further argue that Bearden was not entitled to 21 days of paid military leave between October 1, 2020, and September 30, 2021, because he was not scheduled to work any day during that period. *Id.* at 10–11. Defendants also assert that Bearden's discrimination claim under USERRA fails because he cannot establish that he has experienced an adverse employment action. *Id.* at 14. And Defendants contend that, under state law, Bearden—not the City—was required to take steps to obtain retirement system service credit from the Department of Retirement Systems. *Id.* at 7–8.

In response, Bearden does not address whether he was entitled to paid military leave for March 7, 2018, or whether the City failed to take steps to obtain retirement system service credit for the month of February 2014. *See* Dkt. 20. Instead, he claims that he was entitled to 21 days of paid military leave between October 1, 2020, and September 30, 2021, under RCW 38.40.060 regardless of whether he was actually scheduled to work any day during that period. *Id.* at 20–23. He further contends that, by requiring him to be

scheduled to work to qualify for paid military leave under RCW 38.40.060, the City violated 20 C.F.R. § 1002.149, which provides that entitlement to non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of military service. *Id.* at 20. Bearden also argues that the City violated 38 U.S.C. § 4316(d)—a statute prohibiting employers from requiring a person on military service to use vacation leave—by charging his absence on March 7, 2018, to his non-military accrued leave.[6] *Id.* at 18 n.5.

He also asserts that a fact issue exists to support his claims of discrimination and constructive discharge under USERRA. *Id.* at 14–15. In support of this argument, Bearden cites to a declaration of Bathke that describes an apparent conspiracy, involving Mayor Dingler, several firefighters, and other City employees, to terminate Bearden's employment with the City. Specifically, Bathke states that Mayor Dingler informed him that she was getting pressure from several firefighters at the department "to find a way to discipline and terminate" Bearden because "his time away for military duties . . . was limiting their ability to select time off." Dkt. 20-2, Ex. A, ¶ 7. Bathke also states that Mayor Dingler directed him to "require advanced written documentation of military leave orders from Lt[.] Bearden in hopes he would resign his employment or . . . Dingler could terminate him for insubordination." *Id.* ¶ 8. Furthermore, according to Bathke, several

[6] Bearden also asserts that the Court should decline to rule on the City's motion for summary judgment, arguing that it is premature. *Id.* at 9. However, more than a year has passed since Bearden filed his response to this motion. During this period, the Court stayed the action while Bearden was on active-duty military service. Dkt. 35. Bearden has since filed a notice of release from active duty wherein he requests the Court to rule on the motions for summary judgment. Dkt. 45. Accordingly, the Court properly rules on these motions.

firefighters informed him that "they were going to make Travis Bearden's life at the fire station 'Living Hell' and they were going to bully [Bearden] to resign as Union President." *Id.* ¶ 9. Additionally, Bathke makes various statements indicating that Mayor Dingler and several firefighters at the department disliked Bearden and that they, along with the City's attorney and human resources specialist, were working to gather unfavorable personal information on Bearden so that he could be fired. *See id.* ¶¶ 10–15. Bathke states that, for these reasons, he "believe[s] Travis has been discriminated against at the City of Ocean Shores Fire Department for his military service and is likely to continue to be harassed and discriminated against by the city staff and fire department members." *Id.* ¶ 16.

Defendants reply that Bearden's constructive discharge claim fails because Bearden has not quit his job and, instead, intends to return to work following his military service. Dkt. 24 at 11.

The second summary judgment motion, Dkt. 28, is directed at Bearden's WLAD claims. Defendants assert that the WLAD claim must be dismissed because Bearden failed to comply with the state tort claim filing requirements enumerated in RCW Ch. 4.96. Dkt. 28 at 5. Bearden responds that dismissal of his WLAD claim is inappropriate because he substantially complied with the requirements in RCW 4.96.020 when he filed his motion to amend the complaint. Dkt. 36 at 4. Alternatively, Bearden asserts that he complied with the state tort claim filing requirements by filing a tort claim form after he filed the amended complaint. *See id.* at 8. Defendants reply that neither of these efforts satisfied the "pre-suit claim filing requirement." Dkt. 37 at 2.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251–52. The moving party bears the initial burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323–24.

There is no requirement that the moving party negate elements of the non-movant's case. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Once the moving party has met its burden, the non-movant must then produce concrete evidence, without

merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson*, 477 U.S. at 248.

B. Retirement System Service Credit for February 2014

Bearden claims that the City violated 38 U.S.C. § 4318 by maintaining a retirement plan that imposes requirements on members of the uniformed services beyond those required or permitted by USERRA. Dkt. 23 at 9. Defendants argue that, contrary to Bearden's belief, the City is not responsible for obtaining Bearden's retirement system service credit for February 2014 because Bearden—not the City—was required to take steps to obtain this credit. Dkt. 15 at 7–8. Defendants also contend that the requirement that Bearden himself obtain this credit does not violate 38 U.S.C. § 4318. *Id.* at 8–9. Bearden does not address either of these arguments. *See* Dkt. 20.

Washington firefighters' retirement system plans are governed by the Washington Law Enforcement Officers' and Firefighters' Retirement System Act, RCW Ch. 41.26. This Act addresses the process through which members of such retirement system plans obtain retirement system service credit. When a member "leaves the employ of an employer to enter the uniformed services," he or she "shall be entitled to retirement system service credit for up to five years of military service." RCW 41.26.520(7). To qualify for such service credit, the member must not only apply for reemployment within the time allotted by statue, but he or she must also take affirmative steps to obtain service credit. *See* RCW 41.26.520(7)(a).

"The member" may do this by either "mak[ing] the employee contributions required under RCW 41.45.060, 41.45.061, and 41.45.067 within five years of

resumption of service or prior to retirement, whichever comes sooner," "pay[ing] the amount required under RCW 41.50.165(2)" if he or she does so "[p]rior to retirement and not within ninety days of the member's honorable discharge or five years of resumption of service," or "provid[ing] to the director [of the department of retirement systems] proof that the member's interruptive military service was during a period of war as defined in RCW 41.04.005." RCW 41.26.520(7)(a)(ii)–(iv).

In other words, the member—not his or her employer—is required to take steps to obtain retirement system service credit from the Department of Retirement Systems. As a result, it was Bearden's responsibility—not the City's—to obtain retirement system service credit for the month of February 2014.

Furthermore, the statutory requirement that Bearden take affirmative steps to obtain retirement system service credit does not violate USERRA. Indeed, USERRA provides that employees are entitled to accrued pension benefits that are contingent upon employee contributions only to the extent that the employee makes payment to his or her pension plan:

> A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a)[7] that are contingent on the making of, or derived

---

[7] Subsection (a) generally provides:

> [I]n the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

38 U.S.C. § 4318(a)(1)(A). Bearden's right to retirement system service credit falls within the ambit of this section.

> from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) *only to the extent the person makes payment to the plan with respect to such contributions or deferrals*.

38 U.S.C. § 4318(b)(2) (emphasis added).

Bearden does not present any evidence that he contributed to his retirement plan for the month of February 2014. Therefore, the state statutory requirement that he make such a contribution to receive retirement system service credit does not violate USERRA.

Accordingly, Defendants' motion for summary judgment on this claim is GRANTED and the claim is DISMISSED with prejudice.

C. Paid Military Leave for March 7, 2018

Bearden claims that Defendants violated various provisions of USERRA by denying him a benefit—specifically, paid military leave on March 7, 2018—to which he was legally entitled under state law. *See* Dkt. 23 at 8–9. Defendants assert that Bearden was not entitled to paid military leave for March 7, 2018, because he did not provide the City with any documentation indicating that he was required to report for military duty that day. Dkt. 15 at 10. Bearden does not respond to this argument. *See* Dkt. 20. Instead, he claims that Defendants violated USERRA by charging his absence on March 7, 2018, to his non-military accrued leave against his consent. *See id.* at 18 n.5.

In Washington, public employees are entitled to 21 days of military leave per year, beginning October 1 and ending the following September 30. RCW 38.40.060(1). As this statute makes clear, such leave applies to only *required* military duty, training, or drills:

> Every officer and employee of the state or of any county, city, or other political subdivision thereof who is a member of the Washington national

> guard or of the army, navy, air force, coast guard, or marine corps reserve of the United States, or of any organized reserve or armed forces of the United States shall be entitled to and shall be granted military leave of absence from such employment for a period not exceeding twenty-one days during each year beginning October 1st and ending the following September 30th in order that the person may report for *required* military duty, training, or drills including those in the national guard under Title 10 U.S.C., Title 32 U.S.C., or state active status.

Id. (emphasis added).

During periods of required military leave, employees "shall receive from the state, or the county, city, or other political subdivision, his or her normal pay." RCW 38.40.060(3).

In response to Bearden's request for paid military leave on March 7, 2018, Bathke directed Bearden to provide the City with military orders to reflect that he was required to report for military duty, training, or drills on that day. Dkt. 17 at 32. Bearden responded that he "did not have orders" and requested Bathke to cite to a "state or federal ruling" requiring orders to be produced. *Id.* at 34. Bathke responded that, under RCW 38.40.060, military leave applied to only *required* military duty, training, or drills. *Id.* at 36. Bathke also informed Bearden that he could submit "a letter or other documentation from [his] commanding officer to establish that [his] absence on March 7 was for 'required military duty, training, or drills.'" *Id.* Bearden never provided the City with any such documentation. *Id.* at 3, ¶ 7.

Because military leave under RCW 38.40.060(1) applies to only required military duty, training, or drills, Bearden was required substantiate his request for paid leave with some documentation indicating that he was required to report for military duty. He did

not do so. Furthermore, Bearden does not explain how any of the USERRA statutes or regulations that serve as a basis for his claims nullify the state statutory requirement that he substantiate his request for paid military leave under RCW 38.40.060.

Instead, he asserts that Defendants violated 38 U.S.C. § 4316(d) by charging his absence on March 7, 2018, to his non-military accrued leave against his consent. *See* Dkt. 20 at 18 n.5. The cited statute states, in pertinent part, that "[n]o employer may *require* any [person whose employment with an employer is interrupted by a period of service in the uniformed services] to use vacation, annual, or similar leave during such period." 38 U.S.C. § 4316(d) (emphasis added). In support of his argument that Defendants violated this statute, Bearden relies on the following statement made by the City's finance director in a declaration: "Ultimately plaintiff did not provide documentation to support his request for military leave on March 7, 2018, so this day was charged to his accrued leave." Dkt. 17 at 3, ¶ 7. This statement does not provide any indication that Defendants *required* Bearden to use non-military leave for this day. Rather, it provides merely that Bearden's absence on March 7, 2018, was charged to his non-military accrued leave. This is insufficient to survive summary judgment on this claim.

Accordingly, to the extent that Bearden claims that Defendants violated USERRA by not charging him paid military leave on March 7, 2018, and, instead, by charging this day to his other accrued leave, Defendants' motion for summary judgment is GRANTED and these claims are DISMISSED with prejudice.

D. Paid Military Leave between October 1, 2020, and September 30, 2021

Bearden claims that Defendants violated various provisions of USERRA by denying him a benefit to which he was owed under state law—namely, 21 days of paid military leave between October 1, 2020, and September 30, 2021, pursuant to RCW 38.40.060. Dkt. 23 at 8–9. Defendants contend that Bearden is not entitled to 21 days of paid military leave because he was not scheduled to work for the City for any day during that period. Dkt. 15 at 10–11. Bearden does not dispute that he was not scheduled to work during that time. *See* Dkt. 20 at 20–23. Instead, he argues that RCW 38.40.060 does not require him to establish that he was, in fact, scheduled to work. *Id.*

As already explained, public employees in Washington are entitled to 21 days of paid military leave per year, beginning October 1 and ending the following September 30. *See* RCW 38.40.060(1), (2). Notably, however, public employees "shall be charged military leave *only for days that he or she is scheduled to work* for the state or the county, city, or other political subdivision." RCW 38.40.060(4)(a) (emphasis added).

In late 2019, Bearden submitted an order to the City informing it that he would be on military duty for more than nine months—from November 5, 2019, through August 27, 2020. Dkt. 18 at 2, ¶ 3; 6. Bearden exhausted both his paid military leave and other accrued leave in February 2020. Dkt. 17 at 3, ¶ 8. That month, the City's human resources specialist informed Bearden that he was placed on leave without pay status because he had exhausted all his accrued leave. Dkt. 18 at 10. In July 2020, Bearden submitted another order to the City providing that he would remain on military duty for

an additional 273 days, and thus that he would not return to work in August 2020. *Id.* at 2, ¶ 3; 8.

In late October 2020, while he was still on extended military leave, Bearden requested payment for 21 days of military leave beginning October 1, 2020, pursuant to RCW 38.40.060. *Id.* at 12. The City declined to pay him for those days, informing him that he was not entitled to paid military leave because he was not scheduled to work any days beginning October 1, 2020. *Id.* at 14–15.

Defendants correctly assert that Bearden was not entitled to 21 days of paid military leave between October 1, 2020, and September 30, 2021. *See* Dkt. 15 at 10–13. RCW 38.40.060(4)(a) expressly provides that a public employee "shall be charged military leave only for days that he or she *is scheduled to work* for the state or the county, city, or other political subdivision." (emphasis added). Because Bearden was not scheduled to work any day that he was on extended military leave during the period at issue, he is not entitled to paid leave under this statute.

Nor was the City required to schedule Bearden to work while he was on extended military leave. Indeed, the process by which persons in the uniformed services become eligible to return to a position of employment is governed by 38 U.S.C. § 4312. Subsection (a) of this statute states that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to reemployment rights and benefits and other employment benefits of this chapter if," among other things, "the person reports to, or submits an application for

reemployment to, such employer in accordance with the provisions of subsection (e)." 38 U.S.C. § 4312(a)(3). Subsection (e) provides, in pertinent part:

> [A] person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
> . . .
> (D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

38 U.S.C. § 4312(e)(1)(D).

Bearden's extended military leave far exceeded 180 days. As such, until Bearden submitted "an application for reemployment" within the time specified by statute, the City was not required to schedule Bearden to work for any days from October 1, 2020, through September 30, 2021. *Id.* He did not do so. Therefore, the City was not required to schedule him to work during this period.

Bearden asks the Court to read RCW 38.40.060(4)(a) as stating that "an employer may not charge leave for days the employee *would not regularly be* scheduled to work." Dkt. 20 at 20 (emphasis added). Therefore, Bearden asserts that the City should have charged him military leave days based on the schedule that he worked the year prior to his deployment. *Id.* at 22. Bearden also asserts that his reading of RCW 38.40.060(4)(a) would avoid an interpretation of the statute that would lead to absurd results. *Id.* at 21.

But Bearden's interpretation of the statute would require the Court to impermissibly add words to an otherwise unambiguous statute. *See State v. Delgado*, 148 Wn.2d 723, 727 (2003) ("We cannot add words or clauses to an unambiguous statute

when the legislature has chosen not to include that language."). Moreover, the Court's reading of RCW 38.40.060(4)(a) does not lead to absurd results. Under its plain language, this statute is intended to compensate those who miss scheduled work because they engage in periodic military leave. Because Bearden had been on an extended military leave of absence since November 5, 2019, he was not scheduled to work any day between October 1, 2020, and September 30, 2021. Dkt. 18 at 15. The City was not required to schedule Bearden for days that he was unable to work so that he could be paid for not working on those days.

Bearden also asserts that the Court should disregard the state statutory requirement that he be scheduled to work to receive paid military leave, citing 20 C.F.R. § 1002.149. Dkt. 20 at 19–20. This regulation provides, when an employee is on leave to perform military service, "the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence" and that "[e]ntitlement to the non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service." 20 C.F.R. § 1002.149. This regulation does not nullify the state statutory requirement that an employee be scheduled to work to be entitled to paid military leave.

Furthermore, Bearden does not explain how any other USERRA statute or regulation that serves as a basis for his federal claims is violated by this statutory requirement.

Accordingly, to the extent that the Bearden claims that Defendants violated USERRA by not charging him 21 days of paid military leave between October 1, 2020, and September 30, 2021, Defendants' motion for summary judgment on these claims is GRANTED and they are DISMISSED with prejudice.

E. Discrimination under USERRA

Bearden claims that Defendants discriminated against him in violation of 38 U.S.C. § 4311(b) by taking adverse employment actions against him following his complaints that the City violated his rights under USERRA. Dkt. 23 at 9. Defendants assert that Bearden's discrimination claim fails because he never experienced an adverse employment action. Dkt. 15 at 13–14. In response, Bearden does not identify a single adverse employment action that he has endured. *See* Dkt. 20 at 14–15. Instead, he simply argues that a genuine issue of material fact exists with regard to a separate element of discrimination claims under USERRA—namely, whether his protected status was a *motivating factor* in an adverse employment action. *Id.* at 14.

"USERRA 'prohibit[s] discrimination against persons because of their service in the uniformed services.'" *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (quoting *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 311 (4th Cir. 2001)). To establish a discrimination claim under USERRA, "the employee first has the burden of showing, by a preponderance of the evidence, that his or her protected status was 'a substantial or motivating factor in the adverse [employment] action.'" *Id.* at 899 (quoting *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983)). "[T]he employer may then avoid

liability only by showing, as an affirmative defense, that the employer would have taken the same action without regard to the employee's protected status." *Id.*

"Although the Ninth Circuit has yet to weigh in on this issue, a number of other courts have concluded that a USERRA plaintiff must establish he or she suffered a 'materially adverse' employment action to sustain a discrimination or retaliation claim under USERRA." *Espinoza v. City of Seattle*, 458 F. Supp. 3d 1254, 1271 (W.D. Wash. 2020) (collecting cases). "A materially adverse action is one that significantly alters the terms and conditions of an employee's job, such as termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities." *Id.* (internal quotation marks omitted).

Bearden does not identify any materially adverse employment action that he has endured. Instead, he cites generally to a declaration of Bathke to argue that "the record evidence shows clear evidence of Defendants [sic] unlawful motivation." Dkt. 20 at 14. This is insufficient to establish a genuine issue of material fact on a USERRA discrimination claim. *See Leisek*, 278 F.3d at 899. Bearden also argues that "Chief Bathke testified that he believes that based on his direct observations, '[Bearden] has been discriminated against at the City of Ocean Shores Fire Department for his military service and is likely to continue to be harassed and discriminated against by the city staff and fire department members.'" Dkt. 20 at 14–15 (quoting Dkt. 20-2, ¶ 16). However, "[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to

raise genuine issues of fact and defeat summary judgment."[8] *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). In any event, Bathke's declaration does not provide any evidence that Bearden in fact suffered an adverse employment action.

Accordingly, Defendants' motion for summary judgment on this claim is GRANTED and the claim is DISMISSED with prejudice.

F. Constructive Discharge under USERRA

Bearden claims that Defendants violated 38 U.S.C. § 4311 by engaging in conduct leading to his constructive discharge. Dkt. 23 at 8–9. Defendants assert that Bearden fails to raise a fact issue on his constructive discharge claim because he does not present any evidence that he quit his job with the City. Dkt. 24 at 11. Bearden responds that a fact issue exists on this claim because Defendants engaged "continuous efforts to push [him] out of employment and deny him paid leave, that he was 'hated', 'disliked' for his military service obligations, and that Defendants determined to make his life 'a living hell' on their way to terminated [sic] his employment." Dkt. 20 at 15.

Under USERRA, "[c]onstructive discharge occurs when, 'looking at the totality of the circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'"

---

[8] Defendants move to strike "any references in Mr. Bathke's declaration as to predictions of future actions as being baseless and lacking foundation." Dkt. 24 at 10. Although such statements are insufficient to establish a genuine issue of material fact, the Court declines to strike them. Therefore, this motion to strike is DENIED.

Defendants also move to strike "any references to statements concerning communications with counsel as any such communications between a fire chief and counsel are privileged and Bathke as former fire chief has no authority to waive that privilege." *Id.* Defendants do not identify the statements pertaining to this motion to strike and it is also DENIED.

Wallace v. City of San Diego, 479 F.3d 616, 625 (9th Cir. 2007) (quoting *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)) (internal quotation marks and alteration omitted). Bearden presents no evidence that he quit his job with the City. To the contrary, Bearden testified at his deposition that he intends to return to work for the City when he is no longer on military duty:

> [Defendants' Attorney:] What is your intention, for purposes of employment, when your post deployment terminal leave ends?
> [Bearden:] Return to Ocean Shores.

Dkt. 25 at 5.

Because Bearden does not present any evidence that he quit his job, his constructive discharge claim fails. Accordingly, Defendants' motion for summary judgment on this claim is GRANTED and the claim is DISMISSED with prejudice.

G. Discrimination and Hostile Work Environment under WLAD

Bearden claims that Defendants violated WLAD by both discriminating against and subjecting him to a hostile work environment because of his membership in the uniformed services.[9] Dkt. 23 at 10; Dkt. 20 at 15–17. Defendants contend that Bearden is not entitled to advance these claims because he did not comply with the state tort claim filing requirements enumerated in RCW Ch. 4.96. Dkt. 28 at 5. As such, they request that

[9] Defendants also claim that Bearden fails to raise a fact issue with regard to a hostile work environment claim under USERRA. *See* Dkt. 15 at 14 ("To the extent that plaintiff contends that he was subjected to a 'hostile work environment' based on his military status in violation of USERRA, his claims should be dismissed."). In response, however, Bearden does not raise any argument about a hostile work environment claim under USERRA. *See* Dkt. 20. Instead, the only argument that he advances concerning a hostile work environment is made under WLAD. *See id.* 15–17. Therefore, the Court addresses this claim solely under WLAD.

the Court dismiss these claims without prejudice. Dkt. 37 at 5. Bearden responds that dismissal of these claims is inappropriate because he substantially complied with the requirements in RCW 4.96.020. Dkt. 36 at 4–8.

In Washington, before a plaintiff sues a governmental entity for tortious conduct, the plaintiff must file a "claim for damages." [10] RCW 4.96.010(1). Notably, "[f]iling a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages." *Id.* The chapter's next section, RCW 4.96.020, describes various requirements pertaining to the content of claim forms and the procedure to be followed for filing such forms.

Bearden asserts that he substantially complied with the requirements of RCW 4.96.020 because "[t]he Amended Complaint served with the Motion to Amend on July 27, 2021, includes all of the requirements set forth in RCW § 4.96.020." Dkt. 36 at 5–6. However, this argument disregards the requirement set forth in RCW 4.96.010(1) that the filing of a claim form "be a *condition precedent* to the commencement of any action claiming damages." (emphasis added). Indeed, "[t]he purpose of this claim is 'to allow government entities time to investigate, evaluate, and settle claims' *before they are sued*." *Renner v. City of Marysville*, 168 Wn.2d 540, 545 (2010) (en banc) (emphasis added) (quoting *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 310 (2002)). The motion to

[10] This requirement extends to suits arising from the conduct of government employees for torts committed by the employee within the scope of his or her work for the government. *See Hanson v. Carmona*, 16 Wn. App. 2d 834, 840–41 (2021). Accordingly, Bearden was required to file a claim for damages with regard to his claims that Mayor Dingler violated WLAD.

amend the complaint "commenced" Bearden's suit against Defendants with regard to the WLAD claims. As such, it did not function as a claim form.

Bearden also contends that he satisfied the statutory claim form requirements by filing a notice of tort claim on October 19, 2021. Dkt. 36 at 8. However, this was *after* Bearden filed both his motion to amend and his amended complaint. *See* Dkts. 11, 23. As such, it was untimely under RCW 4.96.010(1).

Where, as here, a party fails to comply with the statutory claim form requirements in RCW Ch. 4.96, dismissal is appropriate. *See Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 968–69 (2014). Accordingly, Defendants' motion for summary judgment on Bearden's WLAD claims is GRANTED and those claims are DISMISSED without prejudice.

III. ORDER

Therefore, it is hereby **ORDERED** that Defendants' motions for summary judgment, Dkts. 15, 28, are **GRANTED**. Bearden's USERRA claims are **DISMISSED with prejudice** and his WLAD claims are **DISMISSED without prejudice**.

The Clerk shall enter a JUDGMENT and close the case.

Dated this 8th day of December, 2022.

BENJAMIN H. SETTLE
United States District Judge